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## **Your Forced Arbitration is Now Arriving: How Pre-dispute Mandatory Arbitration Clauses in the Uber Application Reflects the Widening Gap Between Consumers and Businesses**

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## PART I: INTRODUCTION

One evening in Paris, during the winter of 2008, Travis Kalanick and Garrett Camp experienced a dilemma that most people have experienced at least once in their lives: they were unable to hail a cab.<sup>1</sup> It was in this moment that their story became unique, for Kalanick and Camp decided there should be an easier way for people all over the world to obtain transportation from point A to point B.<sup>2</sup> In March of 2009, their dream became a reality when they founded UberCab, “a smartphone app that lets people tap a button and get a ride.”<sup>3</sup>

In a little over nine years, the company now called Uber has operated over 5 billion trips in 65 countries and over 600 cities around the globe.<sup>4</sup> They have partnered with several different charities, provided jobs for the disabled and military veterans, established an UberPool option to help reduce carbon emissions, and have even begun to operate self-driving vehicles in certain cities.<sup>5</sup> According to their website, they service 75 million riders, employ 3 million drivers, and complete about 15 million trips each day.<sup>6</sup> Uber has become an enormous international company based on the premise of providing transportation whenever needed.<sup>7</sup> The idea was simple, but the logistics of employing that many drivers to provide rides each day creates the potential for numerous complications.<sup>8</sup> Camp and Kalanick’s creation massively improved modes of transportation for the world, yet also created a huge problem for consumers and their ability to sue Uber for any wrongdoings on the company’s part. Most consumers are either not familiar with or do not fully understand what they are giving up when they enter into agreements that

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<sup>1</sup> UBER, <https://www.uber.com/> (last visited May 15, 2019).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> UBER, <https://www.uber.com/> (last visited May 15, 2019).

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

contain mandatory arbitration clauses.<sup>9</sup> This note will focus on the pre-dispute mandatory arbitration clauses that Uber inserted into their terms and conditions and how this type of clause affects the average consumer.

Two recent cases have tackled the issue of whether or not these arbitration clauses are conspicuous enough to be enforceable. These cases created what initially appears to be a circuit split regarding the enforceability and conspicuousness of arbitration clauses that the average consumer confronts when they register for an Uber account.<sup>10</sup> What remains unclear after these decisions is what is considered conspicuous enough to allow a consumer to waive their right to sue Uber in court and whether these cases actually created a circuit split. The Uniform Commercial Code defines “conspicuous” to mean “with reference to a term . . . so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.”<sup>11</sup> Whether a term is “conspicuous” or not is a decision for the court.”<sup>12</sup> In the context of smartphones, reasonable conspicuousness must be determined from the perspective of a reasonably prudent smartphone user.<sup>13</sup> In *Meyer v. Uber Techs., Inc.*, the United States Court of Appeals for the Second Circuit first decided in a class action that Uber’s app provided reasonably conspicuous notice of the terms of service as a matter of California law.<sup>14</sup> In *Cullinane v. Uber Techs., Inc.*, the United States Court of Appeals for the First Circuit created the “split” by ruling for the plaintiffs, holding that users of the ride-sharing service were not reasonably notified of the arbitration clause because the notice of the agreement was not

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<sup>9</sup> Consumer Fin. Protection Bureau, Arbitration Study (2015),

[https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

<sup>10</sup> See *Meyer v. Uber Techs.*, 868 F.3d 66, 78 (2d Cir. 2017); *Cullinane v. Uber Techs.*, 893 F.3d 53, 55 (1st Cir. 2018).

<sup>11</sup> U.C.C. § 1-201

<sup>12</sup> U.C.C. § 1-201

<sup>13</sup> 6 David Bender, *Computer Law* § 61.05 (2018).

<sup>14</sup> *Meyer v. Uber Techs.*, 868 F.3d 66, 78 (2d Cir. 2017).

conspicuous within the meaning of Massachusetts's law.<sup>15</sup> Though the courts came to different decisions regarding whether the app's interface was conspicuous enough to give the user notice of its terms and conditions, it is not certain that these courts would actually disagree with each other. As discussed further below, the layout of the Uber app in each case was different for the users.<sup>16</sup> The standard that the courts used to come to their holdings was essentially the same, but the cases dealt with slightly different facts that may have affected the outcomes in each case.

These courts did not address the issue of whether or not mandatory arbitration clauses that are contained inside the agreements of streamlined and frequently used mobile apps such as Uber's are fair to consumers. In this note, I will analyze this issue that the First and Second circuits did not reach, as well as discuss the legislation that different states use to govern questions of pre-dispute mandatory arbitration clauses in a world that is relying more and more on technology in the daily lives of consumers. I first begin this note with a general discussion of arbitration clauses and their use in web-based contracts. I then move to an analysis of the circuit split between the First and Second Circuits. Finally, I review consumer understanding of arbitration clauses and domestic and international legislation on arbitration and their advantages and disadvantages. My discussion and analysis will show that even though states are attempting to strike a balance between the needs of consumers and the practicability of arbitration for corporations, the use of clickwraps and browswraps in today's technologically-dependent society places a significant burden on the average smartphone user by creating more streamlined contracts inside of apps that are used daily by consumers who have very little bargaining power. In addition to that, the increasing inequality of bargaining power demonstrates the need for a more evenhanded development of user agreements and use of arbitration clauses. The complete

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<sup>15</sup> *Id.* at 62.

<sup>16</sup> *Meyer*, 868 F.3d at 73; *Cullinane*, 893 F.3d at 62.

elimination of arbitration clauses in the Uber app is not realistic, nor is it practical, but Uber, and other similar companies need to be much more conspicuous and transparent about what rights consumers are waiving when they register. These issues will only increase as smartphones find more ways to integrate themselves into our lives.

## **PART II: ARBITRATION CLAUSES AND THE CIRCUIT SPLIT**

### **A. Arbitration Clauses and Procedures**

The most common use for arbitration is to solve the problems of the tort system.<sup>17</sup> Generally speaking, parties involved in a dispute can agree after the fact to submit the dispute to a forum other than a court of law.<sup>18</sup> Likewise, “parties to a contract can agree at the time of entering the contract to an alternative means of resolving” their disputes, if one were to arise between them in the future.<sup>19</sup> “The most common form of alternative dispute resolution (ADR) provided for in contracts is final and binding arbitration in which a privately-appointed individual – an arbitrator – is empowered to resolve claims that arise between the parties.”<sup>20</sup> The American Arbitration Association’s boilerplate arbitration clause reads as follows:

#### 1.1 Arbitration of future disputes.

(a) Scope, governing rules. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be determined by final and binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules and Mediation Procedures ("Commercial Rules") [including, if appropriate, [the Procedures for Large, Complex Commercial Disputes] [./and] [the International Commercial Arbitration Supplementary Procedures] [and] [the Supplementary Rules for Class Arbitrations]].<sup>21</sup>

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<sup>17</sup> BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIAL AND PROBLEMS (8th ed. 2018).

<sup>18</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>19</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>20</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>21</sup> Clauses for the AAA, ICDR, ICC and UNCITRAL Arbitration, Practical Law Standard Clauses 6-502-3569.

“Arbitration provisions are now commonplace in consumer contracts. Consumers can choose to pursue arbitration and waive their right to sue in court.”<sup>22</sup> These clauses require the parties to settle their dispute in the presence of an arbitrator who acts as a judge, by reviewing both parties’ arguments and making a decision based on those arguments and all evidence presented.<sup>23</sup> In the business context, these decisions are binding, and employers and various companies have included such clauses in contracts to prevent the costly and time-consuming process of litigation.<sup>24</sup>

Some advantages of arbitration are “diminished complexity in fact-finding, lower costs, fairer results, greater access for smaller claims, and a reduced burden on the courts.”<sup>25</sup> Mandatory arbitration is not required to be included in contracts or in any setting by any state.<sup>26</sup> There are certain disadvantages to arbitration as well.<sup>27</sup> These disadvantages mostly affect the consumer such as when lawyers increase the costs and duration of arbitration that can sometimes match litigation.<sup>28</sup> Another disadvantage is the “repeat player” phenomenon.<sup>29</sup> Repeat players are the institutions that engage in arbitration so regularly that they have a much higher victory rate than employees or consumers who have rarely if ever participated in arbitration.<sup>30</sup> A study in employment arbitration cases “found that the odds are 5-1 against the employee in a repeat-player case.”<sup>31</sup> Analysts believe that this disadvantage “may be due to the ability and incentive

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<sup>22</sup> *Atalese v. U.S. Leg. Services Group*, 99 A.3d 306, 309 (N.J. 2014).

<sup>23</sup> Arbitration, DICTIONARY.COM, <https://www.dictionary.com/browse/arbitration>

<sup>24</sup> Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 848 (2010).

<sup>25</sup> FURROW, ET. AL, *supra* note 17.

<sup>26</sup> FURROW, ET. AL, *supra* note 17.

<sup>27</sup> FURROW, ET. AL, *supra* note 17.

<sup>28</sup> FURROW, ET. AL, *supra* note 17.

<sup>29</sup> BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIAL AND PROBLEMS* (8th ed. 2018).

<sup>30</sup> FURROW, ET. AL, *supra* note 17.

<sup>31</sup> FURROW, ET. AL, *supra* note 17.

of repeat players to track the predisposition of arbitrators and bias the selection process in their favor.”<sup>32</sup>

In March of 2017, legislators introduced an amendment to the Federal Arbitration Act.<sup>33</sup> This amendment, the Arbitration Fairness Act, aimed to prohibit pre-dispute arbitration clauses if one party tried to enforce the clause on another in an employment, consumer, antitrust, or civil rights dispute.<sup>34</sup> Congress found that while “the Federal Arbitration Act was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power,” courts have extended its reach over the years through judicial interpretation to cover “consumer disputes and employment disputes, contrary to the intent of Congress.”<sup>35</sup> Congress also found the following: “(1) most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration, (2) consumers and employees are often not even aware that they have given up their rights, (3) pre-dispute mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions, and (4) arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs *after* the dispute arises”.<sup>36</sup> This bill never passed. Thus, the unresolved concerns reflected in the congressional findings underscore the need for further reform to both federal law and state law as well.<sup>37</sup>

While Congress began to question the role that mandatory arbitration clauses played in consumers' lives, courts seemed to be moving in the opposite direction. As one arbitration scholar has noted, “[d]espite paying homage to the role of consent in arbitration, United States

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<sup>32</sup> FURROW, ET. AL, *supra* note 17.

<sup>33</sup> The Arbitration Fairness Act, S. 537, 115<sup>th</sup> Cong. (2017).

<sup>34</sup> Senate Bill 537.

<sup>35</sup> Senate Bill 537.

<sup>36</sup> Senate Bill 537 (emphasis added).

<sup>37</sup> The Arbitration Fairness Act, S. 537, 115<sup>th</sup> Cong. (2017).

courts over time have moved away from the traditional definition of waiver (intentional relinquishment of a known right) when the concept is applied to agreements for private resolution of otherwise justiciable disputes.”<sup>38</sup> Indeed, the courts have redefined “consent” to mean “any evidence of an assent to arbitration,” regardless of whether the parties negotiate or even know about the arbitration clause, whether the clause covers the subject matter of the claim, and whether the clause is prohibited by state law.<sup>39</sup> “The previously voluntary decision to trust one’s fate to [ADR] has morphed into a compulsory obligation, so long as the relevant counterparty inserts the magic word ‘arbitration’ somewhere into the contract.”<sup>40</sup>

## **B. Web-Based Contracts**

One of the basic building blocks of contract law states that a contract is formed when there is a meeting of the minds and a manifestation of mutual assent.<sup>41</sup> In order to have mutual assent, the parties to a contract need to have a fundamental “understanding of the terms to which they have agreed.”<sup>42</sup> Acceptance of these terms can be as simple as an electronic ‘click’, provided that the layout and language of the website afford “the user reasonable notice that a click will manifest assent.”<sup>43</sup> Contract formation via the internet “has not fundamentally changed the principles of contract law.”<sup>44</sup> Given society’s technological advances, web-based contracts are a standard way for consumers to enter into agreements with producers.<sup>45</sup> Not only

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<sup>38</sup> Walter D. Kelley, Jr., “Mandatory Arbitration in the United States and Europe”, Hausfeld (Feb. 29, 2016), [https://www.hausfeld.com/news-press/mandatory-arbitration-in-the-united-state-and-europe?lang\\_id=1](https://www.hausfeld.com/news-press/mandatory-arbitration-in-the-united-state-and-europe?lang_id=1).

<sup>39</sup> Kelley, *supra* note 38.

<sup>40</sup> Kelley, *supra* note 38.

<sup>41</sup> Hines v. Overstock.com, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

<sup>42</sup> Atalese v. U.S. Leg. Services Group, 99 A.3d 306, 313 (N.J. 2014).

<sup>43</sup> 6 David Bender, *Computer Law* § 61.05 (2018).

<sup>44</sup> Hines v. Overstock.com, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

<sup>45</sup> *Id.* at 366.



are they more commonplace, but the ease and speed with which these agreements are entered into are unparalleled when compared with more traditional written contracts.<sup>46</sup>

Courts have clarified, however, that different types of web-based agreements may require varying level of assent in order for a contract to be valid.<sup>47</sup> Clickwrap agreements require users to click an “I agree” box after being presented with the terms.<sup>48</sup> Browsewrap agreements generally post terms on a website via a hyperlink at the bottom of the screen.<sup>49</sup> Courts routinely uphold clickwraps because the user has affirmatively assented by clicking “I agree.”<sup>50</sup> Unlike clickwraps, browsewraps do not require express assent.<sup>51</sup> Because a browsewrap requires no affirmative action other than use of the website, its validity depends on whether the user has actual or constructive knowledge of the terms.<sup>52</sup> Scrollwraps appear in some online agreements, and require the user to scroll through the terms before the user can indicate his or her assent by clicking “I agree.”<sup>53</sup> These differ from clickwraps and browsewraps because users are required to scroll through the terms and conditions before agreeing to them. Sign-in-wraps notify the user of the existence of the website's terms of use and, instead of providing an “I agree” button, advise the user that he or she is agreeing to the terms of service when registering or signing up.<sup>54</sup> As technology becomes more advanced, courts will need to continue to adapt to the different ways that contracts are formed via the internet.

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<sup>46</sup> *Id.* at 366.

<sup>47</sup> 6 David Bender, *Computer Law* § 61.05 (2018).

<sup>48</sup> Bender, *supra* note 47.

<sup>49</sup> Bender, *supra* note 47.

<sup>50</sup> *Hines*, 668 F. Supp. 2d at 366.

<sup>51</sup> Bender, *supra* note 47.

<sup>52</sup> Bender, *supra* note 47.

<sup>53</sup> *Meyer v. Uber Techs.*, 868 F.3d 66, 75 (2d Cir. 2017).

<sup>54</sup> *Id.* at 76.

Presently, courts have not adapted the fundamental principles of contract law to contracts formed through new technology.<sup>55</sup> The basic tenets of contract law may still control, but courts should be wary that the bargaining power of companies that take advantage of new innovations in technology does not increase to such a level as to create a significant disadvantage for consumers. Companies and consumers both adapt to changes in technology, but it is unclear whether the effects these changes have on consumers' rights are fully understood by these companies, their consumers, and even by the courts.

### **C. The Second Circuit Takes on Pre-dispute Arbitration Clauses in Uber Agreements**

Courts began to analyze mandatory arbitration clauses in mobile apps by reviewing how the terms and conditions are displayed in the app. This analysis parallels how courts review physical contracts between two parties. But the Second Circuit's decision *Meyer v. Uber Techs.*, demonstrates that courts do not always take into account the effects that these types of contracts may have on consumers in future disputes such as the decrease in bargaining power and the costs to the consumers.

Specifically, in *Meyer v. Uber Techs.*, the plaintiff downloaded the Uber app on his Samsung Galaxy S5 and took ten rides with Uber drivers in New York, Connecticut, Washington, D.C., and Paris.<sup>56</sup> On behalf of a putative class of Uber riders, Meyer sued Uber "alleging the Uber App allowed drivers to fix prices amongst themselves, in violation of the Sherman Act and the Donnelly Act."<sup>57</sup> The district court denied Uber's motion to compel

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<sup>55</sup> *Hines*, 668 F. Supp. 2d at 366.

<sup>56</sup> *Meyer*, 868 F.3d at 70.

<sup>57</sup> *Id.* at 72.

arbitration.<sup>58</sup> It concluded that Meyer did not have reasonably conspicuous notice of the Terms of Service and did not unambiguously manifest assent to the terms.<sup>59</sup>

The Second Circuit addressed whether there was a valid agreement to arbitrate between the plaintiffs and Uber and whether defendants waived their right to enforce an agreement to compel arbitration.<sup>60</sup> Looking to the Federal Arbitration Act, the district court concluded that if an agreement to arbitrate existed, "it should then consider whether the dispute [fell] within the scope of the arbitration agreement."<sup>61</sup> In this case, the parties did not dispute that the plaintiffs' claims would be covered by the arbitration provision of the Terms of Service.<sup>62</sup> Applying California law based upon Uber's principal place of business in accordance with the choice of law clause in the contract's terms and conditions, the court determined that the law in California and New York regarding arbitration agreements was substantially similar.<sup>63</sup>

The court then began a discussion of different web-based contracts and the varying ways that consumers agree to terms and conditions: clickwrap, browsewrap, scrollwraps, and sign-in-wraps.<sup>64</sup> In the interface at issue in *Meyer*, a putative user is not required to assent explicitly to the contract terms; the user must instead click a button marked "Register," underneath which the screen states "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with hyperlinks to the Terms of Service and Privacy Policy.<sup>65</sup> The hyperlink in *Meyer* was blue, underlined, and the font was in all capital letters.<sup>66</sup> The court first used an objective test to consider the perspective of a reasonably prudent

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<sup>58</sup> *Id.* at 72.

<sup>59</sup> *Id.* at 79.

<sup>60</sup> *Id.* at 72.

<sup>61</sup> *Meyer*, 868 F.3d at 74.

<sup>62</sup> *Id.* at 74.

<sup>63</sup> *Id.* at 74.

<sup>64</sup> *Id.* at 75.

<sup>65</sup> *Id.* at 71.

<sup>66</sup> *Meyer*, 868 F.3d at 71.

smartphone user in determining the question of reasonable conspicuousness.<sup>67</sup> It discussed the vast number of consumers that own smartphones and use apps that require them to enter into contracts with different companies on a daily basis.<sup>68</sup> The court concluded that the design of the screen and the language used in Uber's app rendered the notice provided reasonable as a matter of California law.<sup>69</sup> The court reasoned that the screen containing the link to the terms was uncluttered, there was no scrolling required to see the link, and that it was blue and underlined such that it was conspicuous enough for a reasonable user.<sup>70</sup> The Court concluded that the sentence that contained the link, "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," was directly below the registration button, thereby implying that by selecting "register" a consumer agreed to the terms contained in that link.<sup>71</sup>

The Court ultimately determined that the plaintiffs' assent was unambiguous due to the ample evidence that a reasonable user would be on inquiry notice of the terms.<sup>72</sup> "Inquiry notice is actual notice of circumstances sufficient to put a prudent man upon inquiry."<sup>73</sup> The spatial and temporal coupling of the terms with the registration button "indicate[d] to the consumer that he or she is . . . employing such services subject to additional terms and conditions that may one day affect him or her."<sup>74</sup> Thus, the court held that the consumer was bound by the arbitration provision.

#### **D. The First Circuit Finds the Terms and Conditions Not Conspicuous Enough for a Reasonable User.**

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<sup>67</sup> *Id.* at 75.

<sup>68</sup> *Id.* at 77.

<sup>69</sup> *Id.* at 79.

<sup>70</sup> *Id.* at 78.

<sup>71</sup> *Meyer*, 868 F.3d at 78.

<sup>72</sup> *Id.* at 78.

<sup>73</sup> *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012).

<sup>74</sup> *Meyer v. Uber Techs.*, 868 F.3d 66, 78 (2d Cir. 2017).

The First Circuit’s decision in *Cullinane v. Uber Techs.*, was a win for the consumers in the case, but in the grand scheme, it may prove to not be as helpful as some believe.

Specifically, in *Cullinane*, four plaintiffs downloaded the Uber app on their smartphones and registered for accounts.<sup>75</sup> All four ordered Ubers for transportation in and around Boston<sup>76</sup> and claimed that Uber unnecessarily charged them the Massport Surcharge and the East Boston toll<sup>77</sup> even though Massachusetts did not require such fees to be charged to Uber passengers.<sup>78</sup>

In deciding whether to enforce Uber’s purported arbitration clause, the First Circuit closely analyzed the interface of Uber’s in-app registration process, providing screenshots of the Uber app in its opinion.<sup>79</sup> Describing in extensive detail each page of the registration process, the court paid particular attention to the font color, size of any words on the page and the color of the background.<sup>80</sup> The “Terms of Service & Privacy Policy” hyperlink was in bold white text enclosed in a gray rectangle on a black background.<sup>81</sup> An implication of agreement preceded the hyperlink.<sup>82</sup> The arbitration portion of the terms stated “[y]ou acknowledge and agree that you and [Uber] are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.”<sup>83</sup> The Court compared Massachusetts law with the Federal Arbitration Act which established that an agreement, written in a contract to settle a controversy by arbitration shall be valid, irrevocable, and enforceable.<sup>84</sup>

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<sup>75</sup> *Cullinane v. Uber Techs.*, 893 F.3d 53, 55 (1st Cir. 2018).

<sup>76</sup> *Id.* at 55-6.

<sup>77</sup> *Id.* at 56.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 56-8.

<sup>80</sup> *Cullinane*, 893 F.3d at 56-8.

<sup>81</sup> *Cullinane*, 893 F.3d at 57.

<sup>82</sup> *Id.* at 57.

<sup>83</sup> *Id.* at 59.

<sup>84</sup> *Id.* at 60.

The Court then turned to whether a written agreement to arbitrate existed, and placed the burden to show this on the party seeking to compel arbitration.<sup>85</sup> It then applied *Ajemian v. Yahoo!, Inc.*, which set forth a two-step inquiry used to determine if an arbitration clause in this case was enforceable.<sup>86</sup> Under this approach, the first step determines whether the contract terms were “reasonably communicated to the plaintiffs.”<sup>87</sup> The second step determines whether the record shows those terms were accepted and, if so, the manner of acceptance.<sup>88</sup> Uber claimed that “its online presentation was sufficiently conspicuous” enough “to bind the plaintiffs whether or not they chose to click through the relevant terms.”<sup>89</sup> The Court looked to the definition of conspicuous under Massachusetts law to resolve the first step of the inquiry.<sup>90</sup> It then concluded that pursuant to the Massachusetts law, “conspicuous” is defined as so “written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it.”<sup>91</sup> Applying this standard, the court held that the plaintiffs were not reasonably notified of the terms of the Agreement because Uber did not use a common method to display the terms and conditions.<sup>92</sup> It found that the link was not blue and underlined as hyperlinks usually are and that there were many other noticeable terms on the page that diminished the conspicuousness of the link for the terms and conditions.<sup>93</sup> As to the second question, the First Circuit concluded that “the fact that the plaintiffs were not reasonably notified of the terms of the Agreement, [demonstrated] they did not provide their unambiguous assent to those terms.”<sup>94</sup>

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<sup>85</sup> *Cullinane*, 893 F.3d at 60.

<sup>86</sup> *Id.* at 61-2 (citing *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 575 (May 7, 2013)).

<sup>87</sup> *Id.* at 62.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Cullinane*, 893 F.3d at 62.

<sup>91</sup> *Cullinane*, 893 F.3d at 62, (citing ALM GL ch. 106, § 1-201).

<sup>92</sup> *Cullinane*, 893 F.3d at 62.

<sup>93</sup> *Id.* at 63.

<sup>94</sup> *Id.* at 64.

The decisions by the First and Second Circuits that resulted in a “split”, only scratched the surface of the real issue at stake. The First and Second circuits did not disagree on the application of a federal law as the word “split” implies. Rather, they applied the appropriate state law, and based on the facts that were given, came to different conclusions. These cases focused on the appearance of the Uber interface that the plaintiffs experienced and whether or not the links to the terms and conditions were conspicuous enough to put the plaintiffs on notice that they were accepting the agreement and waiving their right to a trial by jury.<sup>95</sup> The circuit courts did not broach the issue of whether or not these clauses are inherently suspect or prejudicial towards consumers. Perhaps, they took a narrow view of the arbitration clauses in these cases to avoid the issue altogether. Referenced above, legislation in the United States clearly supports the use of pre-dispute mandatory arbitration clauses, even in a mobile application agreement such as the ones used by Uber.<sup>96</sup> Based on the facts of *Meyer*, it seems that the First Circuit would have made the same decision as the Second Circuit if Uber highlighted in blue instead of grey, the hyperlink that brought the user to the terms and conditions, and if that particular screen was less cluttered.<sup>97</sup> Even if these facts were different and the court held the terms and conditions were reasonably conspicuous to the user, as addressed next, it still would not solve the issue of inequality between the consumer and the business in their “meeting of the minds.”

### **PART III: HOW TECHNOLOGY HAS WIDENED THE GAP BETWEEN CONSUMERS AND BUSINESSES**

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<sup>95</sup> *Meyer*, 868 F.3d at 73; *Cullinane*., 893 F.3d at 62.

<sup>96</sup> *Atalese*, 99 A.3d at 312.

<sup>97</sup> *Cullinane*, 893 F.3d at 64.

The congressional findings in the proposed Arbitration Fairness Act, as well as the original purpose of the Federal Arbitration Act, illustrate that there is a substantial need for more consideration of the average consumer's knowledge and rights in pre-dispute mandatory arbitration clauses that appear in consumer contracts. As previously discussed, courts have analyzed whether the terms and conditions are conspicuous enough to put an average consumer on notice of the terms and if so, whether that is enough to hold them to the arbitration clause.<sup>98</sup> Courts, however, have not contemplated whether consumers as a class tend to understand what rights they are waiving by registering for an account on an app even if the consumers know that they are agreeing to the terms and conditions. Courts should instead be considering whether consumers fully understand that they are giving up their right to a trial, whether the company, in good faith, notified the consumer of such a waiver, and the bargaining power of both parties. These factors should be considered along with the analysis shared by both the First and Second Circuits. Mobile applications such as the one created by Uber expose more consumers to contract agreements than any other type of consumer contract due to the frequency with which mobile applications are used in our daily lives.<sup>99</sup> While it is often argued that most consumers actively choose not to read the terms and conditions in these mobile app agreements, whether or not that is true, should not be dispositive of the issue. Just because consumers abstain from reading the agreements does not mean they fully understand what rights they are waiving and how this could affect them in the future.<sup>100</sup> Nor should they be forced to enter into an unfair arbitration process. In traditional contract law, one who signs a contract without reading it, is still bound by the contract.<sup>101</sup> While that principle is reasonable between two parties that are on

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<sup>98</sup> *Id.*

<sup>99</sup> Meyer v. Uber Techs., 868 F.3d 66, 77 (2d Cir. 2017).

<sup>100</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>101</sup> Ray v. Eurice, 93 A.2d 272, 278 (Md. 1952).



equal footing, it becomes untenable with the introduction of technology and the way in which it is used by the average consumer today. Choosing to abstain from or to waive your rights to something, when you do not have all of the relevant information should not lead you to be bound by that agreement. Studies have shown that even when consumers read such terms and conditions, they still do not understand the consequences of their assent.<sup>102</sup> “Mutual assent requires that the parties have an understanding of the terms to which they have agreed. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.”<sup>103</sup> The First and Second Circuits did not address the real issue: whether pre-dispute mandatory arbitration clauses in the mobile applications are fair to the consumer and should be enforced.

#### **A. Consumers’ Understanding of Arbitration Clauses**

Today, there is an ever-increasing amount of people who buy smartphones, smart watches, and tablets that allow you to download mobile applications that require the consumer to enter into a contract in order to participate in that app’s services.<sup>104</sup> Some examples are: Lyft, Venmo, Facebook, and any mobile banking app.<sup>105</sup> As Chief Justice Roberts put it in *Riley v. California*,<sup>106</sup> “. . . modern cell phones are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”<sup>107</sup> Presumably because of our reliance on technology, and more specifically, our phones, the objective of app developers is to make the registration process as quick and seamless

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<sup>102</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>103</sup> *Atalese v. U.S. Leg. Services Group*, 99 A.3d 306, 313 (N.J. 2014).

<sup>104</sup> *Meyer.*, 868 F.3d 66, 77 (2d Cir. 2017).

<sup>105</sup> LYFT, <https://www.lyft.com/> (last visited May 15, 2019); VENMO, <https://venmo.com/> (last visited May 15, 2019); FACEBOOK, <https://www.facebook.com/> (last visited May 15, 2019); WELLS FARGO, <https://www.wellsfargo.com/mobile/apps/> (last visited May 15, 2019).

<sup>106</sup> 134 S. Ct. 2473 (2014).

<sup>107</sup> *Id.* at 77 (quoting *Riley*, 134 S. Ct. 2473).

as possible for the consumer. The average consumer today expects these kinds of processes to be streamlined and efficient so that they can enjoy the app within minutes or even seconds of downloading it. Uber’s novel app has changed the landscape of transportation services. Instead of calling a phone number of an unfamiliar cab company, or standing on the sidewalk with your hand in the air as handfuls of yellow cabs drive by, you can simply order a car to come pick you up within minutes and usually for a reasonable rate. This service has become so popular, other similar ride-sharing services such as Lyft or Via have entered the market.<sup>108</sup>

What people may not consider, or perhaps have chosen not to care about when they take part in this exchange, is that they are entering into a contract to have a company provide a ride for you and your belongings from point A to point B, and that many different legal issues can arise from such a simple transaction. “An average member of the public may not know — without some explanatory comment — that arbitration is a substitute for the right to have one’s claim adjudicated in a court of law.”<sup>109</sup>

The Consumer Financial Protection Bureau (CFPB) did a study in 2015 on arbitration and one section specifically focused on what consumers understand about dispute resolution systems specifically in credit card agreements.<sup>110</sup> When Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, it instructed the CFPB to study “the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services,” and to report their findings back to Congress.<sup>111</sup> The survey explored the role of dispute resolution clauses in consumer decisions to

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<sup>108</sup> LYFT, <https://www.lyft.com/> (last visited May 15, 2019); VIA, <https://ridewithvia.com/> (last visited May 15, 2019).

<sup>109</sup> *Roman v. Bergen Logistics*, 192 A.3d 1029, 1037 (N.J. Super. App. Div. 2018) (citing *Atalese v. U.S. Leg. Services Group*, 99 A.3d 306, 313 (N.J. 2014)).

<sup>110</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>111</sup> CFPB 2015 Arbitration Study, *supra* note 9.

acquire credit cards and consumers' awareness, understanding, or knowledge of their dispute resolution rights.<sup>112</sup> The reason for this study, according to the CFPB, was because most "of the empirical work on arbitration that has been carried out has not had a consumer financial focus."<sup>113</sup> The majority of the consumers surveyed were unsure if they could sue the credit card company in court when their agreements contained an arbitration clause.<sup>114</sup> Over a third believed they could, knowing that their agreements contained arbitration clauses included in their contracts.<sup>115</sup> The results of the survey show most consumers are not aware of what arbitration clauses are or whether or not they are included in their contracts.<sup>116</sup> A lack of knowledge in our society on this subject is significant because of how frequently consumers are entering into these types of agreements.

For example, when a person applies for a credit card, they are provided a credit card agreement that contains all of the provisions of the contract. Whether or not they read this information is their choice, but they are still presented with the agreement and its contents. When registering for an account on Uber, the app simply provides a link to the terms and conditions.<sup>117</sup> The registrants are unable to visualize these terms and do not fully grasp what it is that they are agreeing to.<sup>118</sup> But even though the credit card applicants are able to hold the physical agreement in their hands, it does not make a difference.<sup>119</sup> As the CFPB study shows, even the credit card applicants who received a physical contract and were aware of the existence of an arbitration agreement, did not fully grasp how that affected their rights.<sup>120</sup> Even if every

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<sup>112</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>113</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>114</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>115</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>116</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>117</sup> UBER, <https://www.uber.com/> (last visited May 15, 2019).

<sup>118</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>119</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>120</sup> CFPB 2015 Arbitration Study, *supra* note 9.

consumer took the time to read their contracts, the CFPB study demonstrates that many of these consumers will still not understand to what they are agreeing.

Holding consumers to contracts that require access to a lawyer to fully understand, would also put a strain on businesses that rely on daily use of their services. This would become a costly and time-consuming method for business and individual consumers who are entering into these types of contracts on a daily basis. This demonstrates the need for clarity and unambiguity, something that New Jersey is attempting to offer. The New Jersey Supreme Court (relying on the New Jersey Arbitration Act, which is nearly identical to the Federal Arbitration Act) held that “an arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously.”<sup>121</sup> If anything is clear, it is that most consumers do not understand the wording of pre-dispute mandatory arbitration clauses.

## **B. State Legislation**

The Federal Arbitration Act requires courts to “place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.”<sup>122</sup> Consequently, “a state cannot subject an arbitration agreement to more burdensome requirements than” other contractual provisions.<sup>123</sup> Thus, an arbitration clause cannot be invalidated by state-law “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>124</sup> This does not mean that courts will enforce every arbitration clause regardless of how it is phrased.<sup>125</sup> The Federal Arbitration Act “permits states to regulate ... arbitration agreements under general contract principles,” and a court may

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<sup>121</sup> *Atalese v. U.S. Leg. Services Group*, 99 A.3d 306, 313 (N.J. 2014).

<sup>122</sup> *Id.* at 312.

<sup>123</sup> *Id.* at 312.

<sup>124</sup> *Id.* at 312.

<sup>125</sup> *Id.* at 312.

invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>126</sup>

Some states’ laws on their face appear to be sufficient enough to protect the average consumer. But as the decision in the Second circuit demonstrates, that is not the case. California law is clear that “an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.”<sup>127</sup> California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.”<sup>128</sup> Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms.<sup>129</sup> Whether a reasonably prudent user would be on inquiry notice turns on the “[c]larity and conspicuousness of arbitration terms.”<sup>130</sup> In the context of web-based contracts, clarity and conspicuousness are a function of the design and content of the relevant interface.<sup>131</sup> Only if the undisputed facts establish that there is “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms” will a court find that a contract has been formed.<sup>132</sup>

California and Massachusetts law are similar in their analyses of the enforceability of web-based arbitration clauses.<sup>133</sup> Under Massachusetts law, courts will enforce arbitration

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<sup>126</sup> *Atalese*, 99 A.3d at 312 (citing *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 877 (N.J. 2002) (Holding that plaintiff’s claim that employer violated the Family Medical Leave Act could not go to trial because the employee signed an employment application containing an arbitration agreement)).

<sup>127</sup> *Meyer*, 868 F.3d at 74.

<sup>128</sup> *Id.* at 74.

<sup>129</sup> *Id.* at 75.

<sup>130</sup> *Id.* at 75.

<sup>131</sup> *Id.* at 75.

<sup>132</sup> *Meyer*, 868 F.3d at 75.

<sup>133</sup> *See Meyer*, 868 F.3d at 74; *Cullinane*, 893 F.3d 53 at 62.

clauses in web-based contracts if there is reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers.<sup>134</sup> These are essential if electronic bargaining is to have integrity and credibility.<sup>135</sup> Massachusetts law uses the objective standard to determine if the terms are conspicuous to a reasonable person.<sup>136</sup> Despite the split in the circuit courts' decisions, the cases highlight the fact that two different states may have the same standards, but the facts of each case are highly relevant.

Unlike Massachusetts or California law, New Jersey law focuses not only on whether or not the terms and conditions were conspicuous enough for the user, but also on whether the provisions are sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right.<sup>137</sup> In fact, under New Jersey law, this rule is not specific to arbitration clauses, but to any contractual "waiver-of-rights provision."<sup>138</sup> The Court requires that such provisions "reflect that [the party] has agreed clearly and unambiguously to its terms."<sup>139</sup> The objective of this approach "is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue."<sup>140</sup> For example, in *Atalese v. U.S. Legal Services Group, L.P.*, the New Jersey Supreme Court invalidated an arbitration clause because "nowhere in the arbitration clause [was] there any explanation that plaintiff is waiv[ed] her right to seek relief in court for a breach of her statutory rights."<sup>141</sup> The provision in that case "[did] not explain what arbitration is, nor [did] it indicate how arbitration is different from a proceeding in a court of law. Nor [was] it written in plain

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<sup>134</sup> *Cullinane*, 893 F.3d at 61.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 62.

<sup>137</sup> *Atalese*, 99 A.3d at 309.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 313.

<sup>140</sup> *Id.* at 314.

<sup>141</sup> *Id.* at 315.

language that would be clear and understandable to the average consumer that she is waiving statutory rights.”<sup>142</sup> All predispute mandatory arbitration clauses trigger unequal bargaining power and uninformed consent issues.<sup>143</sup>

Instead of allowing these issues to continue, states should elevate the requirements of the conspicuousness of a corporation’s terms and conditions in mobile applications. The high rate at which smartphone users download and partake in mobile application services daily, and the growing trend of streamlined registration processes emphasize the need for more consumer protection when agreeing to a company’s terms and conditions.<sup>144</sup> It is a basic principle in contract law that “absent fraud, duress or mutual mistake, that one having the capacity to understand a written document who reads and signs it, or, without reading it or having it read to him, signs it, is bound by his signature in law, at least.”<sup>145</sup> States need to adapt their contract laws to the technological advances of today’s world. One way in which terms and conditions of web-based or mobile application contracts can be written more fairly for consumers is to have the requirement of specific assent to all clauses that result in the waiver of rights in clickwrap agreements.<sup>146</sup>

For example, consistent with this approach, one commentator has highlighted the fact that “[w]rap contracts contain blanket assent, the all-or-nothing provision in which the contract is formed entirely if there is an opportunity to read.” However, in [her] proposal, for each rights-foreclosure provision, the non-drafting party must click “I agree.”<sup>147</sup> Consumers would then

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<sup>142</sup> *Atalese*, 99 A.3d at 315.

<sup>143</sup> *Meyer*, 868 F.3d at 73; *Cullinane*, 893 F.3d 53 at 62.

<sup>144</sup> STATISTA, <https://www.statista.com/statistics/330695/number-of-smartphone-users-worldwide/> (Last visited May 15, 2019).

<sup>145</sup> *Ray v. Eurice*, 93 A.2d 272, 278 (Md. 1952).

<sup>146</sup> Heather Daiza, Comment, *Wrap Contracts: How They Can Work Better for Businesses and Consumers*, 54 CAL. W. L. REV. 203, 225 (2017).

<sup>147</sup> *Diaza*, *supra* note 146, at 225.

have more of an opportunity to see the specific provision that waives their rights before they agree to it.<sup>148</sup> This proposal could be implemented into the terms and conditions that users must agree to when registering for an account on the Uber App. Uber and other similar businesses would also be less inclined to insert any unconscionable terms into the agreement.<sup>149</sup> This active participation on the consumer's part is beneficial for those businesses as well.<sup>150</sup> Indeed, review by the consumers of each rights-foreclosure provision would create more certainty that consumers actually agreed to the terms and are therefore bound by them.<sup>151</sup> As a result, this could save Uber money in dealing with lengthy litigation over whether or not the contract is enforceable.<sup>152</sup> Even if Uber is allowed to prohibit users from registering if they do not agree to the specific arbitration provision, then at least the user is now aware of what right they are giving up if they decide to agree. At first, most people will probably agree in order to obtain the convenient service that they offer. But as more and more consumers are faced with this dilemma of whether to waive their right to a trial for the convenience of the app, it will force companies like Uber to change their policies in order to compete.

Applying the approach used by the Court in *Atalese* regarding the clarity of the arbitration clause, the arbitration provisions in Uber's agreement should clearly define arbitration, how it is different from a trial in a court of law, and what right is being waived.<sup>153</sup> This way, the consumer is automatically brought to the arbitration clause when registering, required to agree to this clause specifically before registration is complete, and will be able to better understand what they are agreeing to at the time they agree to it and not after a dispute

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<sup>148</sup> Diaz, *supra* note 146, at 225.

<sup>149</sup> Diaz, *supra* note 146, at 225.

<sup>150</sup> Diaz, *supra* note 146, at 225.

<sup>151</sup> Heather Daiza, Comment, *Wrap Contracts: How They Can Work Better for Businesses and Consumers*, 54 CAL. W. L. REV. 203, 225 (2017).

<sup>152</sup> Diaz, *supra* note 151, at 225.

<sup>153</sup> *Atalese*, 99 A.3d at 315.



arises. This idea would require the consumer to spend more time on the registration process, but given the demand for ride-share services, it is hard to imagine that this would deter many people from signing up for an account. Admittedly, there are many different aspects of an arbitration clause, which are reflected in Uber's terms and conditions.<sup>154</sup> Currently, the Uber App arbitration clause starts with this section highlighted in bold font unlike the rest of the agreement:

By agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration, as set forth in this Arbitration Agreement. This will preclude you from bringing any class, collective, or representative action against Uber, and also preclude you from participating in or recovering relief under any current or future class, collective, consolidated, or representative action brought against Uber by someone else.<sup>155</sup>

Underneath this conspicuous section are many more provisions regarding arbitration.<sup>156</sup> This bold section referenced above would be a fitting place for Uber to require the registrant go, to specifically agree to these terms. If Uber were to follow the approach set forth in *Atalese*, they could use the above section to delineate in simple terms what arbitration means, how it is different from a trial in a court of law, and what right is being waived.<sup>157</sup> An enforceable arbitration agreement "at least in some general and sufficiently broad way, must explain that [a] plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute."<sup>158</sup>

The CFPB study underscores the fact that even though there are thousands of people who may enter into contracts with credit card companies, a majority of people will choose not to litigate over incorrect fees or other wrongs committed by the companies.<sup>159</sup> Corporations impose pre-dispute mandatory arbitration clauses in order to avoid the costs of frequent and lengthy

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<sup>154</sup> UBER, <https://www.uber.com/> (last visited May 15, 2019).

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *Atalese*, 99 A.3d at 315.

<sup>158</sup> *Roman v. Bergen Logistics*, 192 A.3d 1029, 1038 (N.J. Super. App. Div. 2018) (the court held the arbitration provision unenforceable due to lack of language indicating that consumer was waiving her statutory right to seek relief in a court of law) *citing Atalese*, 99 A.3d at 315-16.

<sup>159</sup> CFPB 2015 Arbitration Study, *supra* note 9.

trials.<sup>160</sup> The reality is, however, that most consumers share this goal. To avoid going to trial many would rather accept the incorrect fee or just cancel their account.<sup>161</sup> Taking into account the demand for Uber rides and the fact that Uber provides 15 million rides per day to 75 million users, adding the specific-assent proposal with clear, unambiguous language to Uber's user agreement would not be such an inconvenience to new Uber users that they would not sign up for an account. It may cost Uber money to implement this change to their interface, but it would also potentially save them the time and energy of having to defend cases like *Meyer* or *Cullinane* in court because more consumers would be aware of the procedure.

### **C. Consumer Protection Laws Abroad**

The European Union (EU) is much more strict when it comes to these pre-dispute mandatory arbitration clauses and offers a potential model here.<sup>162</sup> In 1993, the EU passed the Unfair Contract Terms Directive (UCTD) because advancements in technology generated a pervasiveness of unfair practices in non-negotiated contracts.<sup>163</sup> The EU came to the realization that these non-negotiable standard-form contract provisions needed to be regulated otherwise there would be abuses.<sup>164</sup> The UCTD works to render a contract "unenforceable if the terms (1) are non-negotiable, (2) create significant imbalance between the rights of the parties, and (3) that imbalance is contrary to good faith."<sup>165</sup> Certain clauses are "presumed to be unfair because they unreasonably shift risk to the consumer."<sup>166</sup> Among many clauses that are blacklisted whenever they appear as non-negotiable are browsewrap or clickwrap contract formation and pre-dispute

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<sup>160</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>161</sup> CFPB 2015 Arbitration Study, *supra* note 9.

<sup>162</sup> Daiza, *supra* note 151, at 222.

<sup>163</sup> Daiza, *supra* note 151, at 222.

<sup>164</sup> Daiza, *supra* note 151, at 222.

<sup>165</sup> Daiza, *supra* note 151, at 222-23.

<sup>166</sup> Daiza, *supra* note 151, at 223.

mandatory arbitration.<sup>167</sup> If a business based in the United States offers a product or service in the EU, they must alter their contracts in order to comply with the stricter consumer protection laws.<sup>168</sup> According to their website, Uber operates in 144 cities in Europe.<sup>169</sup> While not all of these are necessarily in the EU, there are still numerous cities in the EU in which Uber operates. This means that if Uber does not adjust their clauses, then they are in noncompliance with the UCTD and their existing clauses are potentially subject to invalidation if challenged.

Besides blacklisting certain provisions, the UCTD also provides that contract terms must be “drafted in plain and intelligible language, and states that ambiguities shall be interpreted in favor of consumers.”<sup>170</sup> This legislation has improved “the balance between consumers and businesses” and has also deterred businesses “from utilizing their superior bargaining power in a manner that oppresses parties who lack such power.”<sup>171</sup> The EU places and emphasis on striking a balance between consumers and businesses because it believes that businesses should act in good faith when dealing with consumers and non-negotiable contract terms can lead to abuses.<sup>172</sup>

Other members of the EU have executed laws that are even more protective of consumers than the UCTD.<sup>173</sup> Arbitration clauses in the United Kingdom are presumed to be prejudicial “if the amount at issue is less than £ 5000.”<sup>174</sup> Arbitration clauses in general are completely prohibited in France when they are employed in domestic disputes such as divorce or custody issues.<sup>175</sup> In Sweden, arbitration clauses in contracts for “the sale of goods and services for

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<sup>167</sup> *Id.* at 223.

<sup>168</sup> *Id.*

<sup>169</sup> UBER, <https://www.uber.com/> (last visited May 15, 2019).

<sup>170</sup> Daiza, *supra* note 151, at 223-24.

<sup>171</sup> Daiza, *supra* note 151, at 224.

<sup>172</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. L

<sup>173</sup> Kelley, *supra* note 26.

<sup>174</sup> Kelley, *supra* note 26.

<sup>175</sup> Kelley, *supra* note 26.

private use” are generally prohibited.<sup>176</sup> “Germany won’t enforce a consumer arbitration clause unless it is in a separate, signed document or part of a fully notarized contract.”<sup>177</sup>

The Canadian government has also taken steps to provide more protection for their citizens when dealing with pre-dispute mandatory arbitration clauses.<sup>178</sup> In Ontario, you are not bound by “clauses to a contract that say that you must use a private arbitration process to resolve complaints instead of going to court or seeking assistance from the Ministry of Government and Consumer Services . . . even if you have accepted the agreement.”<sup>179</sup> Similarly, there is a Consumer Protection Act in Quebec that states,

[a]ny stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer’s right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.<sup>180</sup>

The consumer may agree to go to arbitration if a dispute occurs after the contract has been entered into, but they cannot be forced to do so.<sup>181</sup>

Arbitration clauses used by companies such as Uber have a legitimate purpose and the advantages of their use are compelling enough to allow these companies to use them. The cost and length of litigation can be onerous, especially when a company’s product is used as frequently as Uber’s. The act of eliminating arbitration clauses altogether may benefit consumers greatly, but it would also place a huge burden on companies to deal with costly and time-consuming litigation that could result in a significant depletion of their resources. Though many countries have done away with arbitration clauses, others have simply increased their

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<sup>176</sup> Kelley, *supra* note 38.

<sup>177</sup> Kelley, *supra* note 38.

<sup>178</sup> STIKEMAN ELLIOT LLP, CANADA: CONSUMER PROTECTION LAW OVERVIEW (2017).

<sup>179</sup> Consumer Protection Act, S.O. 2002, c. 30, Sched. A (2002) (Can.).

<sup>180</sup> Consumer Protection Act, R.S.Q. 2002, P-40.1 (Can.).

<sup>181</sup> Consumer Protection Act, R.S.Q. 2002.

consumer protection, while still allowing these clauses to exist in certain situations discussed above. At the very least, The United States needs to follow suit and increase consumer protection when it comes to arbitration clauses. More transparency about what rights the consumers are waiving as well as a more conspicuous agreement will greatly improve consumer protection.

#### **PART IV: CONCLUSION**

As scholars have begun to recognize, the gap between consumer contracts and contract law is causing consumer contracts to become predominantly more one-sided, unreadable, unnoticeable, and more favorable to businesses.<sup>182</sup> As technology continues to advance and the human race becomes more and more reliant on it to serve us in our daily lives, this gap will only continue to grow. Referenced earlier, “businesses would [] benefit from clear standards regarding contract presentation and what is considered unconscionable.”<sup>183</sup> The courts need to move away from interpreting whether the terms and conditions are accessible and easily discoverable to the average consumer. They should move towards a more beneficial test that places emphasis not only on the average consumer’s ability to comprehend the magnitude and the consequences of the contracts into which they are entering on a frequent basis but also on whether or not they even understand that they are entering into a contract in the first place.

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<sup>182</sup> Daiza, *supra* note 151 at 222.

<sup>183</sup> *Id.* at 203.